No. 18-422

In the Supreme Court of the United States

ROBERT A. RUCHO, *et al.*,

Appellants,

v.

COMMON CAUSE, *et al.*,

Appellees.

On Appeal from the United States District Court for the Middle District of North Carolina

Brief of Speaker Michael C. Turzai, in His Official Capacity as Constitutional Officer of the Pennsylvania House of Representatives, as *Amicus Curiae* in Support of Appellants

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QUESTION PRESENTED

Whether plaintiffs' partisan-gerrymandering claims are justiciable.

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INTEREST OF THE *AMICUS CURIAE*

Representative Michael Turzai is the Speaker of the Pennsylvania House of Representatives and files this brief in his official capacity. He, like all state legislators, is interested in seeing the Constitution's delegation of federal-election-law authority to state legislatures honored against the position, adopted below, that courts should supervise legislatures' political discretion and deliberative processes. Pennsylvania was ground zero in 2018 for so-called partisan-gerrymandering litigation. The Commonwealth faced three simultaneous challenges, won two trial victories, and spent an enormous sum in legal fees defending the congressional redistricting legislation it enacted under the Constitution's express grant of authority—and with bipartisan support. This effort proved unavailing because the Pennsylvania Supreme Court, overruling decades of precedent, struck down the challenged plan and implemented its own, all at breakneck speed for the transparent purpose of influencing the 2018 elections for Democratic Party gain. This experience shows why partisan-gerrymandering claims should be ruled non-justiciable.[1]

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[1] Pursuant to Rule 37.6, counsel for the *amicus* certifies that no counsel for any party authored this brief in whole or in part and that no person or entity other than the *amicus* or his counsel made a monetary contribution intended to fund the brief's preparation or submission. Letters from the parties consenting to the filing of *amicus* briefs are filed with the clerk.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

When the constitutional framers delegated the power to prescribe "[t]he Times, Places and Manner of" congressional elections to "the Legislature" of each state and to "Congress," U.S. Const. art. I, § 4, cl. 1, they knew they were delegating that power to political actors. Those bodies are—no less then than now—composed of politicians, and the framers understood the delegation as one of "discretionary power over elections." The Federalist No. 59, at 398 (Hamilton) (Jacob Cooke ed., 1961). It was both foreseeable and in fact foreseen that political considerations would guide that constitutionally afforded discretion.

The district court profoundly misread this provision, known as the "Elections Clause," by locating in it a source of *judicial* power to invalidate congressional redistricting legislation it identified as too political. This could hardly be more backwards: the district court read the Clause as denying state legislatures political discretion it plainly grants them and as granting the courts purely political power it plainly denies them. "Politics and political considerations are inseparable from districting and apportionment." *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973). It is precisely because legislatures engage in politics that this Court has repeatedly held that "redistricting is primarily a matter for legislative consideration and determination." *Reynolds v. Sims*, 377 U.S. 533, 586 (1964). Although courts certainly may review redistricting legislation under neutral constitutional and statutory *legal* standards—and even then only

with "extraordinary caution," *Miller v. Johnson*, 515 U.S. 900, 916 (1995)—it is implausible that the Elections Clause contains "judicially discoverable and manageable standards," *Baker v. Carr*, 369 U.S. 186, 217 (1962), by which a court may invalidate legislation it deems too political. That invades the very essence of the power the Elections Clause delegates to non-judicial bodies.

The district court confused these legislative and judicial roles because it confused two different inquiries. One is whether legislation enacted under the Elections Clause in fact regulates the times, places, or manner of elections—a proper question for the judiciary. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 804–5 (1995). But, here, that inquiry is simple because North Carolina's congressional redistricting plan plainly regulates election procedure by grouping voters into districts and dictating where they vote. The other inquiry, the one the district court conducted, is whether a law that *does* regulate election procedure somehow ceases to qualify under the Elections Clause because of political motive. That inquiry is improper. Just as a congressional act that directly regulates interstate commerce is no less Commerce Clause legislation when accompanied by a political purpose, Elections Clause legislation is valid as such simply if it sets election procedure. Courts may not question ulterior motive or effect when assessing whether legislation exceeds an affirmative delegation of power.

The district court's approach to the Elections Clause improperly reads the judiciary into the provision, which makes no mention of courts (state or federal) and which

necessarily excludes them, as a matter of both plain language and original public meaning. Because the Clause contains no standard for differentiating good from bad political motive, the power the court claimed is nothing but a veto power to be exercised at will and for political results. Further, it claimed the additional power to replace legislation it deemed overly partisan with its own remedial scheme. Thus, the power it ultimately asserted is nothing less than the power to regulate the times, places, and manner of congressional elections directly from the bench. If that seems incongruous with the Constitution's plain language, that's because it is.

Far from establishing an independent source of judicial intrusion into congressional redistricting, the Elections Clause forecloses judicial intervention on political grounds under *any* constitutional provision. The Clause renders the type of question the district court entertained—which, at base, is what percentage of a congressional district should comprise a political party's perceived supporters—a quintessential political question. Predicating judicial review directly on legislatures' political choices would disfigure the Clause's delegation beyond recognition. Unlike claims asserting one-person, one-vote and racial-discrimination violations, this type of claim turns directly on legislatures' deliberative processes and empowers judges to wield political considerations as weapons in supervising and striking down legislative policy and, ultimately, replacing it with judicial policy. That a proffered reading of the First and Fourteenth Amendments would authorize this "substantial intrusion into the Nation's political life" by judges is

dispositive evidence against it. *Vieth v. Jubelirer*, 541 U.S. 267, 306 (2004) (Kennedy, J., concurring).

Redistricting is political because of what it is, not because of who does it. Reading the courts into the Elections Clause would not take politics out redistricting; it would bring politics into the courts. Pennsylvania experienced that firsthand in 2018. After a Democratic Party majority took hold of the Pennsylvania Supreme Court and justices campaigned on the promise that, if elected, they would strike down the Commonwealth's congressional maps, the court overruled decades of precedent and imposed a so-called remedial plan that virtually all observers recognized as a Democratic Party gerrymander—which meticulously counteracted the inherent geographic disadvantage Democratic Party supporters experience due to their concentration in and around Philadelphia and Pittsburgh. Calls for impeachment followed, as did, later, a slew of Democratic Party wins in the new districts. Only justices who were members of the Democratic Party voted for this *coup d'état*. By contrast, the legislation they struck down passed with bipartisan support.

This highly publicized and disgraceful episode manifests the very type of power struggle the Elections Clause plainly preempts. Courts and legislatures should not be at loggerheads over the power to regulate congressional elections; the Constitution expressly resolves such disputes. The district court's decision ignores that constitutional fact and should be reversed.

ARGUMENT

The Elections Clause commits power to regulate elections to "the Legislature" of each state and to "Congress," and it denies that power to other branches of the state and federal governments. U.S. Const. art. I, § 4, cl. 1. The term "Legislature" was "not one 'of uncertain meaning when incorporated into the Constitution.'" *Smiley v. Holm*, 285 U.S. 355, 365 (1932) (quoting *Hawke v. Smith*, 253 U.S. 221, 227 (1920)). The word necessarily differentiates between that body and the "state" of which it is but a subpart. And just as the term is "a limitation upon the state in respect of any attempt to circumscribe the legislative power" over federal elections, *McPherson v. Blacker*, 146 U.S. 1, 25 (1892), the term "Congress" limits the power the other federal branches may exert over the same. An Article I delegation to "Congress" is not a delegation to the "judicial power of the United States" under Article III. And, the judiciary possessing (like the other federal branches) only limited powers, the absence of a delegation is an express denial of power. *See, e.g.*, *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).[2]

In delegating authority to two political bodies, the Clause plainly anticipates an exercise of *political* discretion. *Vieth v. Jubelirer*, 541 U.S. 267, 285 (2004) (plurality opinion) ("The Constitution clearly

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[2] Because the Elections Clause is the sole source of state authority over congressional elections and that power "had to be delegated to, rather than reserved by, the states," *Cook v. Gralike*, 531 U.S. 510, 522 (2001), state courts are no differently situated from their federal counterparts in this unique arena.

contemplates districting by political entities, see Article I, § 4, and unsurprisingly that turns out to be root-and-branch a matter of politics."). The framers understood the Clause to delegate "discretionary power over elections." The Federalist No. 59, at 398 (Hamilton) (Jacob Cooke ed., 1961). This includes the prerogative to exercise "Will," the power to "prescribe[] the rules by which the duties and rights of every citizen are to be regulated." The Federalist No. 78, *supra*, at 523, 526 (Hamilton). That is all the Elections Clause delegates; the framers identified no legal principle to guide "judgment," the prerogative of courts. *See id.*

Discretion, of course, can be abused. The framers, no strangers to human nature, expressly recognized that potential. They appreciated that the power to regulate federal elections might be wielded for petty, parochial, or partisan purposes. 2 Records of the Federal Convention of 1787, at 241 (Max Farrand ed., 1911) (James Madison observing that legislatures might "mould their regulations as to favor the candidates they wished to succeed"). It is even, they saw, the power even to "annihilate" the federal government itself. The Federalist No. 59, *supra*, at 399 (Hamilton). But, as in so many constitutional provisions, the framers responded to these threats, not by codifying standards differentiating fair from unfair election laws, but by setting checks and balances, dividing the power between two political branches. They delegated primary authority over congressional elections "in each State" to "the Legislature thereof," and empowered Congress to check that power, i.e., "make or alter such Regulations." The resulting provision, the Elections Clause, placed two political

checks against each other, setting fire up to fight fire. *See Vieth*, 541 U.S. at 275–76 (plurality opinion).

It is therefore implausible that the Elections Clause supplies "agreed upon substantive principles of fairness in districting" or "clear, manageable, and politically neutral standards" for adjudicating partisan-gerrymandering claims. *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring). Rather than codify those principles, the Clause delegates power to create them. Indeed, the Elections Clause contains "a textually demonstrable commitment" of those precise issues "to a coordinate political department" (actually, two) and establishes other telltale indicia of a nonjusticiable political question. *Baker v. Carr*, 369 U.S. 86, 217 (1962). Nor is there anything to recommend unprecedented judicial frolics into the "political thicket."[3] Inserting courts into the Elections Clause would do far more to bring politics into the judiciary than to remove partisanship from redistricting. The Court need only look to Pennsylvania's embarrassing experience to see why that is so.

I. The Elections Clause Contains No Judicially Discernable Standard To Govern Partisan-Gerrymandering Claims

A. The Elections Clause Is Not a Source of Judicial Standards

The Elections Clause does not establish substantive principles of fairness; it delegates political questions to political actors. The Clause uses "comprehensive words" that "embrace authority to provide a complete

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[3] *Colegrove v. Green*, 328 U.S. 549, 556 (1946).

code for congressional elections." *Smiley v. Holm*, 285 U.S. 355, 366 (1932). Nothing in the text remotely implies "principles of fairness" that judges may impose *against* legislation that otherwise regulates elections procedure. *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring). To the contrary, the Clause's plain language and its location in Article I both signal that those choices are vested in non-judicial bodies.

In the debates over this hotly contested provision, the idea that courts might play a role in regulating federal elections appears to have occurred to no one. Alexander Hamilton, for example, found it axiomatic that "there were only three ways, in which this power could have been reasonably modified and disposed": in the state legislatures, in Congress, or divided between the two. The Federalist No. 59, *supra*, at 398–99 (Hamilton). That is hardly surprising, since (as noted) the framers drew a bright line between judicial and legislative power. Redistricting is not an act of legal judgment; it is "primarily a political and legislative process." *Gaffney v. Cummings*, 412 U.S. 735, 749 (1973). It was not intuitive then, and is not now, that judges might properly wield political authority over redistricting.

The Clause's language is no accident. The district court believed that "*partisan* gerrymandering" was not "widespread" before 1789, which it apparently took as a license for its anti-textual interpretation. *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 849 (M.D.N.C. 2018). But the framing generation was familiar with redistricting disputes and appreciated that governmental branches might vie for power over lines. For example, "the Tudor sovereigns systematically

pursued the policy of creating insignificant boroughs...for the express purpose of corruptly supporting the influence of the Crown in the House of Commons," and the "House of Commons took the issue of writs into its own hands" after the English Civil War. Thomas Pitt Taswell-Langmead, English Constitutional History 565–66 (Philip A. Ashworth ed., 6th ed. 1905); *see also* Rudolf Gneist, The English Parliament in Its Transformations Through a Thousand Years 241 (R. Jenery Shee trans., 1886) ("Now," at the reign of Charles II, "the right of the Crown to create new boroughs disappears."). Likewise, the royal governors exercised the right to extend representation to new counties in the American colonies, which the colonists considered an "insufferable intrusion." Leonard Woods Labaree, Royal Government in America: A Study of the British Colonial System Before 1783, at 98–99, 333–34 (Yale University Press 2d prtg. 1934). The framing generation, then, knew that power to prescribe election rules may reside somewhere other than the legislature, it knew that this may create inter-branch conflicts, and the Elections Clause plainly preempts those conflicts. The district court's interpretation frustrates that purpose.

Further, the Clause can hardly provide uniform partisan-gerrymandering standards when it plainly establishes *local* control over, and encourages broad variation in, election procedure. It was common ground at the ratification debates that inserting a uniform elections code directly into the Constitution was unworkable, since it would be impossible to account for "every probable change in the situation of the country." The Federalist No. 59, *supra*, at 398 (Hamilton).

Similarly, it was uncontroversial that state legislatures should possess primary authority over elections procedure "on account of their ability to adapt the regulation, from time to time, to the peculiar local, or political convenience of the states." 2 Joseph Story, Commentaries on the Constitution of the United States § 820 (1st ed. 1833) ("Story"). Accordingly, the idea of "empowering the United States to regulate the elections from the particular States" was universally condemned as "an unwarrantable transposition of power" and "a premediated engine for the destruction of the State governments." *Id.*; *see also* 2 Story § 812 ("The objection [to the Elections Clause] was not to that part of the clause, which vests in the state legislatures the power of prescribing the times, places, and manner of holding elections...."). In fact, the objection to *any* congressional involvement in regulating elections was answered with the claim that Congress would prove incapable of abusing its Elections Clause authority: "[t]he interests, the habits, the institutions, the local employments, the state of property, the genius, and the manners, of the people of the different states, are so various, and even opposite, that it would be impossible to bring a majority of either house to agree upon any plan of elections" to achieve an abusive purpose at the national level. *Id.* § 818; *see also* 1 William Blackstone, Commentaries ("Blackstone"), app., note D at 191–92 (George Tucker ed., 1803) ("[A]ny attempt to render the manner of election uniform must therefore inevitably produce discontents among the states.").

Accordingly, the long-elusive "agreed upon substantive principles of fairness in districting," *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring), cannot be founded in this provision. Reading them in would codify

the very nationally applicable standards the framers deliberately withheld. As Justice Kennedy observed in *Vieth*, redistricting standards like "contiguity and compactness" cannot "promise political neutrality" because "a decision under these standards would unavoidably have significant political effect, whether intended or not." *Id.* at 308–09. That is because "if we were to demand that congressional districts take a particular shape, we could not assure the parties that this criterion, neutral enough on its face, would not in fact benefit one political party over another." *Id.* at 309. What is true in the abstract is even truer when compounded across 50 states and innumerable political subdivisions. How political motive and impact become manifest will depend on local geography and politics. The very factors that militated against a constitutionally prescribed elections code foreclose any attempt to read a uniform standard of fairness into the Clause.

B. The Elections Clause Inquiry Is Limited to Whether, on Its Face, Legislation Regulates Election Procedure, as Every Redistricting Plan Does

The district court purported to find a standard because it confused two distinct forms of inquiry, one legitimate and the other illegitimate. *See Rucho*, 318 F. Supp. 3d at 936–41.

The legitimate inquiry is whether challenged legislation properly falls within the Elections Clause's express delegation. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 804–05 (1995). That federal courts may review legislation on this basis is well established and uncontroversial—and irrelevant here.

This role is no different from the courts' role in policing *any* positive grant of authority, such as Congress's Commerce Clause power, its spending power, and its power to enforce the Civil War Amendments.

Because the scope of review is limited to assessing whether the exercise is "appropriate" to that grant, *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819), judicial review of Elections Clause legislation is limited to whether it exceeds the "'broad power' to prescribe the procedural mechanisms for holding congressional elections," *Cook v. Gralike*, 531 U.S. 510, 523 (2001). In particular, the Court has reviewed whether legislation falls within those "comprehensive words," "Times, Places, and Manner," *Smiley*, 285 U.S. at 366; *see Thornton*, 514 U.S. at 832–36, and whether legislative action was exercised by "the Legislature," *see Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2673 (2015).

A redistricting plan—*every* redistricting plan—satisfies this test. Districting legislation "classifies tracts of land, precincts or census blocks," *Hunt v. Cromartie*, 526 U.S. 541, 547 (1999), and clearly sets the "Places" and "Manner" of elections. It assigns voters to districts and representatives and dictates where they vote. Under the correct inquiry, North Carolina's districts plainly qualify.

The district court could conclude otherwise only because it conducted a separate, improper inquiry into legislative motive, adjudicating whether the North Carolina legislature's facially valid procedural rule was accompanied by some (ill-defined) purpose and effect. *See Rucho*, 318 F. Supp. 3d at 938. That was legal

error. Motive is irrelevant to whether an exercise of authority falls within a positive grant of power. *See, e.g.*, *Sonzinsky v. United States*, 300 U.S. 506, 513–14 (1937) (finding inquiry into "hidden motives" to be "beyond the competency of courts" in assessing whether tax legislation exceeded constitutional taxing authority); *McCray v. United States*, 195 U.S. 27, 56 (1904) (rejecting the notion "that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted"); *see also Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 130 (1810).

The question whether legislation exceeds a positive delegation differs in this respect from the question whether legislation infringes on individual rights. Courts probe motive in individual-rights cases because "[a] statute, otherwise neutral on its face," violates individual rights if it is "applied so as invidiously to discriminate on the basis of race" (or another suspect classification). *Washington v. Davis*, 426 U.S. 229, 241 (1976). For that reason, the Court, in adjudicating equal-protection redistricting cases, *does* look past the "tracts of land, precincts or census blocks" to ascertain if a redistricting plan was "motivated by a racial purpose or object." *Hunt*, 526 U.S. at 546 (quotations omitted). But "object or motive" is of no import in assessing whether legislation fits within an affirmative grant of legislative power. *McCray*, 195 U.S. at 54. To hold otherwise would subject the "wisdom" of legislation to judicial review and "overthrow the entire distinction between the legislative, judicial, and executive departments of the government." *Id.* at 54–56. Accordingly, whether or not North Carolina's redistricting legislation is "a partisan gerrymander"

has no bearing on whether or not it is valid under the Elections Clause. *Cf. Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 203–04 (2008) (affording partisan intent no weight on the question whether a voter identification requirement was an impermissible burden on the right to vote).

The district court misread *Thornton* and *Gralike*, in support of its motive inquiry. *Rucho*, 318 F. Supp. 3d at 936–38. Those cases do not condemn procedural election laws if accompanied by improper motive or effect; they rather condemn laws that do not regulate election procedure at all. *Thornton* concluded that the power to craft procedural laws does not encompass the power to establish qualifications to congressional office. 514 U.S. at 828. It then rejected a state constitutional provision establishing qualifications (term limits) on its face in the form of a ballot-access rule. *Id.* at 833–36. The provision expressly stated: "the people of Arkansas...herein limit the terms of elected officials." *Id.* at 784, 830. Likewise, *Gralike* invalidated a statute that, on its face, expressed government opposition to candidates who declined to support term limits; it viewed this mechanism as the functional equivalent of an impermissible qualification for office. *Gralike*, 531 U.S. at 514–15 ("Section 18 provides that the statement 'DECLINED TO PLEDGE TO SUPPORT TERM LIMITS' be printed on all primary and general election ballots"). Both cases judged the challenged provisions according to their plain text, and neither provision even purported to set time, place, or manner rules.

Thornton's references to "intent" and "effect" must be understood in that context. 514 U.S. at 829, (quotations omitted). Although the decision condemned

legislation "with the avowed purpose and obvious effect of evading the requirements of the Qualifications Clause," *id.* at 831, it in no way suggested that some amorphous degree of motive unrelated to the Qualifications Clause would condemn a law that *does* regulate election procedure.

The problem was that the law in no way regulated election procedure and in every way set qualifications. In response to the argument that the term-limit provision was a ballot-access rule and did not set qualifications, the Court held that this "indirect" measure had "the sole purpose...to achieve a result that is forbidden by the Constitution" and thus was not a procedural rule. *Id.* at 829. Similarly, *Gralike*'s observation that the legislation at issue "is plainly designed to favor candidates who are willing to support the particular form of a term limits amendment" was founded in "a concrete consequence" identifiable in the provision's text. 531 U.S. at 524. It does not follow from either holding that facially neutral state laws that directly and extensively regulate election procedure are invalid on a judicial finding of some type of motive or effect. A redistricting plan, even one enacted to advantage one group over another, is never a "sole...attempt to achieve a result that is forbidden by the Federal Constitution." *Thornton*, 514 U.S. at 829. Notably, the type of fact and expert testimony the district court relied on to discern hidden motive, *see Rucho*, 318 F. Supp. 3d at 868–80, is completely absent from *Thornton* and *Gralike* and foreign to their interpretive approach.

The district court's contrary reading of these precedents is nonsensical. It would equally condemn goals of unfairness and *fairness* in redistricting. That is because the constitutional problem in *Thornton* and *Gralike* was not that the laws were unfair, but that they set qualifications to office. *Thornton*, 514 U.S. at 813–815. If a districting scheme intended to influence electoral results amounts to a qualification, it does not matter whether the qualification is fair or unfair: qualifications *per se* are forbidden. Thus, the district court's reading of these precedents would treat state legislatures' attempts "to allocate political power to the parties in accordance with their voting strength," *Gaffney*, 412 U.S. at 754, no differently from attempts to advantage one group over another. This reading, of course, is untenable. The precedents say nothing whatsoever on this topic and have nothing to do with this case.

II. The Elections Clause Deprives Courts of Authority To Supervise Political Considerations

A. Not only does the Elections Clause itself not support judicial adjudication of so-called partisan-gerrymandering claims, it also is powerful evidence that manageable standards are not to be found in other constitutional provisions. Questions of "fairness" in redistricting are quintessentially political and beyond judicial competency.

1. The Elections Clause contains "a textually demonstrable constitutional commitment" of political discretion over election regulations "to a coordinate political department"—in fact, *two* departments per state, the legislature and Congress. *Baker v. Carr*, 369

U.S. 186, 217 (1962). Although courts may review whether an election law falls under the Clause's delegation (*see* § I.B above) and whether it violates central individual-rights guarantees (*see* § II.B below), review of whether the act is *politically* unfair invades the core of the delegation itself. What is and is not fair is exactly the subject matter the Clause empowers legislatures and Congress to address.

Although the principal recipient of the delegation is the state legislature, that does not extenuate the separation-of-powers harm of judicial review. When it enacts congressional districts, the legislature "is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under...the United States Constitution." *Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70, 76 (2000). Moreover, to seize supervisory authority over elections is to seize *congressional* power, an invasion of authority allocated to "a coordinate political department."

2. The Elections Clause points to "the impossibility of deciding" a partisan-gerrymandering case "without an initial policy determination of a kind clearly for nonjudicial discretion." *Baker*, 369 U.S. at 217. The framers understood that the power delegated under the Elections Clause is "*discretionary*." The Federalist No. 59, *supra*, at 398 (Hamilton) (emphasis added). To evaluate whether discretion is exercised fairly or unfairly is to evaluate whether it is exercised wisely or unwisely, an inquiry unfit for judicial resolution. *See, e.g.*, *Polish Nat'l All. of the U.S. of N. Am. v. N.L.R.B.*, 322 U.S. 643, 650 (1944).

To be precise, the initial policy determination a partisan-gerrymandering claim presents is what does and does not qualify as "fairness in districting." *Vieth v. Jubelirer*, 541 U.S. 267, 307 (2004) (Kennedy, J., concurring). Electing one's preferred candidates is not like expressing one's beliefs: speech can be countered by more speech, so courts can enforce free-speech rights simply by enjoining a speech restraint; they need not limit other persons' ability to communicate an opposing message. By contrast, for one constituency—defined in its preferred way—to elect its preferred candidates, it must outvote competing constituencies, frustrating their ability to do the same. And, for one constituency to obtain more favorable districts, others must lose favorable districts. Identifying whether a redistricting map unfairly burdens a given constituency requires (1) classifying the constituency in one way over another, (2) deciding how much representation it deserves, and (3) deciding from what other constituency to take that representation.

Accordingly, in racial vote-dilution cases, to identify a burden on a judicially enforceable right, the courts must identify "what the right to vote *ought to be*." *Reno v. Bossier Par. Sch. Bd.*, 528 U.S. 320, 334 (2000) (emphasis in original). This requires proof of "some baseline with which to compare" the challenged scheme. *Id.* "[W]here there is no objective and workable standard for choosing a reasonable benchmark by which to evaluate a challenged voting practice, it follows that the voting practice cannot be challenged as dilutive...." *Holder v. Hall*, 512 U.S. 874, 881 (1994).

But, outside the racial context, those questions are political, not legal.[4] North Carolina can be divided into an infinite number of equally populated districts, and an infinite number of baseline maps can therefore be identified—each with its own set of political winners and losers. Constituencies also can be defined and redefined in any number of ways: "farmers or urban dwellers, Christian fundamentalists or Jews, Republicans or Democrats," and so on. *Vieth*, 541 U.S. at 288 (plurality opinion). Democratic and Republican voters do not exist either as facts of nature or as members of constitutionally defined castes; the parties can be broken down into sub-constituencies, and many constituencies have a home in neither party. A *legal right* to elect preferred candidates can only be administered for favored groups (here, the Democratic and Republican Parties), or else administering it would pit the rights of all Americans against each other.

Further, there are innumerable competing principles of fairness. Even if an expert witness creates an algorithm to produce millions of alternative maps by which to measure the alleged gerrymander, the expert necessarily plugs policy judgments into those maps by creating one algorithm, not another. Fairness can be defined geographically, such as under so-called traditional districting principles like compactness,

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[4] Notably, *racial* vote-dilution cases are governed principally by statute, the Voting Rights Act, not the Constitution. *See Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 195–96 (2012) (distinguishing, for justiciability purposes, adjudication of policy matter delegated to political branches from adjudication of statutory rights flowing from statute enacted under that delegation).

contiguity, and political-subdivision integrity. It can, alternatively, be defined under votes-to-seats ratios by comparing how many votes a party obtains against how many seats its candidates win. These measures, too, may be subdivided and reworked under their own internal logic, and they set up competing definitions of fairness as against other methods.

In all these respects, "[t]he wide range of possibilities makes the choice inherently standardless." *Holder*, 512 U.S. at 889. That is why the Constitution delegates these questions to political bodies, not courts. To decide whether a legislature acted fairly, a court must usurp the predicate question of what that even means, a quintessential political question.

3. The Elections Clause renders it impossible for "a court's undertaking independent resolution" of a partisan-gerrymandering case "without expressing lack of the respect due coordinate branches of government." *Baker*, 369 U.S. at 217. A court cannot rule that a legislature engaged in improper "partisan gerrymandering" without concluding that the court knows better than the legislature which competing constituencies deserve electoral representation, in what way, and to what degree. What's more, as the district court recognized, invalidating the legislature's redistricting legislation often necessitates replacing it with a court-drawn scheme. *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 942–44 (M.D.N.C. 2018). That, in turn, means replacing core legislative policy with judicial policy.

Entertaining these questions disrespects both state legislatures and Congress. When it was proposed, the Elections Clause sparked controversy because many

convention delegates were appalled that it authorized Congress to override state legislatures' election laws, universally viewed as a matter for local control. *See* 2 Story § 813. The Federalists retorted, not that election procedure should be viewed primarily as a national matter, but that the power "will be so desirable a boon in [the legislatures'] possession" that Congress would not likely interfere "unless from an extreme necessity, or a very urgent exigency." *Id.* § 820. But a decision by the courts that a legislature acted unfairly—from a political standpoint—would insult both the legislature, by removing this "desirable" "boon" from its "possession," and Congress, by ruling on what is and is not "an extreme" or "very urgent exigency" meriting federal intervention.

In spite of this, the district court erroneously focused on what principles might apply to partisan-gerrymandering claims without asking why *courts* should apply them. *See Rucho*, 318 F. Supp. 3d 937–39. The district court was correct that the framers feared that partisan mischief might twist election procedure, but the court did "not offer evidence of a single word in the history of the Constitutional Convention or in contemporary commentary that even alludes to the possibility of *judicial* review" as the remedy. *Nixon v. United States*, 506 U.S. 224, 233 (1993) (emphasis added).

That no such evidence has been forthcoming is unsurprising. The Clause vests remedial authority with Congress. And to remedy state legislatures' abuse is not "to act in the manner traditional for English and American courts." *Vieth*, 541 U.S. at 278 (plurality opinion). In referencing the "Times, Places and

Manner" of elections, the Elections Clause plainly references what English parliamentary law called "methods of proceeding" as to the "time and place of election" to parliament. *See* 1 Blackstone 163, 177–179. Those "time and place" "methods," in turn, were "regulated by the law of parliament." *Id.* at 177; *see also* 4 E. Coke, Institutes of Laws of England 48 (Brooke, 5th ed. 1797). Neither house would "permit the subordinate courts of law to examine the merits" of an election dispute, and the House of Commons denied "any right" of any officer outside that body "to interfere in the election of commoners" or "intermeddle in elections." 1 Blackstone 163, 179; *see also id.* at 179 (stating that to the house of commons "alone belongs the power of determining contested elections"); George Philips, Lex Parliamentaria 9, 36–37, 70–80 (1689). The House of Commons was not shy to protect its exclusive jurisdiction in this domain. It, for example, declared a *quo warranto* writ from "any Court" that sent burgesses to parliament based on time, place, and manner adjudications to be "illegal and void," and it further opined that the "Occasioners, Procurers, and Judges in such Quo Warranto's" may be punished for jurisdictional usurpation. George Philips, *supra* at 80. By carrying forward that tradition of legislative control over quintessentially legislative matters, the Elections Clause views courts as, if anything, threats to, not vindicators of, "free" elections. 1 Blackstone 179.

4. The Elections Clause codifies "an unusual need for unquestioning adherence to a political decision already made," and it points to "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Baker*, 369 U.S. at 217.

Partisan-gerrymandering claims set courts up as superior branches, capable of second-guessing and even making *political* choices, when they have no competency to do so. These cases are unlike those alleging criminal misconduct or discrimination based on an immutable characteristic, where courts can tailor their proceedings, inquiries, decisions, and remedies to finite questions distinct from those properly left to other branches—and touch on political questions only incidentally. Courts in partisan-gerrymandering cases have no choice but to place the entire deliberative process at issue, because the entire deliberative process is political, and base their determinations squarely on political choices.

Courts have therefore enforced broad subpoenas against elected officials, demanding testimony and documents concerning core political deliberations and decisions. *See, e.g.*, *League of Women Voters of Michigan v. Johnson*, 2018 WL 2335805, at *4 (E.D. Mich. May 23, 2018) (enforcing demand for "all documents, notes, data and analysis related to the 2012 Michigan Redistricting process"); *Agre v. Wolf*, 284 F. Supp. 3d 591, 650 (E.D. Pa. 2018) ("The claim of executive privilege and deliberative privilege asserted by the Legislative Defendants was overruled by this Court."). Such decisions have, in turn, been extended to justify third-party subpoenas to political parties and advocates, demanding wide-ranging document production and testimony about politics, their core organizational mission. *See, e.g.*, *Ohio A. Philip Randolph Inst. v. Larose*, --Fed. App'x--, 2019 WL 259431, at *8 (6th Cir. Jan. 18, 2019) (rejecting mandamus petition to prevent broad discovery into the National Republican Committee and related

organizations). This means that one major political party can fund redistricting litigation and thereby obtain discovery into its opponents' political strategy.

This undermines both the judicial and legislative processes. A judge sits on a dais, orders legislators to appear in court and testify and to produce their political email correspondence with constituents and supporters, and passes judgment on the very *politics* of that information. The impropriety of this can hardly be over-emphasized. The Constitution vests these very political choices with the legislature, so placing the judge over and against the legislature and its constituent members to review those very choices, precisely for their being political, creates the public misimpression that courts—viewed as non-political and fair arbiters of law—are competent to condemn legislators' political choices and views.

Further, an enjoined redistricting plan must be replaced, often by a court-ordered plan. Because political consequences are unavoidable, these plans of necessity reflect policy choices. Under this Court's precedents, district courts must narrowly tailor their remedies, touching only discrete legal violations. They must "honor state policies," not "unnecessarily put aside" legislative decisions, and choose a remedy "which most clearly approximate[s] the reapportionment plan of the state legislature, while satisfying constitutional requirements." *White v. Weiser*, 412 U.S. 783, 795–96 (1973); *see also Upham v. Seamon*, 456 U.S. 37, 42–44 (1982); *Perry v. Perez*, 565 U.S. 388, 394 (2012). But a partisan-gerrymandering claim encompasses the very foundations of the legislative policy decisions, politics and all. Thus,

remedying these would-be violations will eventuate wholesale judicial reinvention of redistricting priorities from scratch. The "state policies" themselves being condemned, district courts will surely implement their own criteria. That means directly "prescrib[ing]" the "Times, Places and Manner" of congressional elections and cutting out "the Legislature" altogether.

In this very case, the district court displayed thinly veiled contempt for the North Carolina legislature, representing that "we have not yet decided whether we will afford the General Assembly another chance" to redistrict and that "the General Assembly should" act "as quickly as possible" in the event that the district court *might*, as a matter of judicial *grace*, allow it that opportunity—on an expedited basis. *Rucho*, 318 F. Supp. 3d at 944. But a state legislature does not need judicial permission to enact congressional redistricting legislation; the Constitution delegates that power directly to the legislature. Honoring that delegation means deferring to legislature's political choices. Subjecting them to judicial process upends the unique need for a single voice on these matters.

B. The Elections Clause renders political-gerrymandering claims non-justiciable even though it does not have this impact on one-person, one-vote and racial-gerrymandering and racial vote-dilution claims. Those claims are governed by a "limited and precise rationale" that allows courts to "correct an established violation of the Constitution" without committing "federal and state courts to unprecedented intervention in the American political process." *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring). They therefore implicate few, if any, of the political-question factors. A partisan-

gerrymandering claim is altogether different; there is no way for courts to adjudicate such claims without seizing for themselves the political discretion constitutionally delegated to other branches. *Cf. Vander Jagt v. O'Neill*, 699 F.2d 1166, 1176 (D.C. Cir. 1982) (concluding that, although constitutionality of House rules is not *per se* beyond judicial review, challenge to partisan motive and impact of House rules presented a "startlingly unattractive," non-justiciable controversy) (quoting *Davids v. Akers*, 549 F.2d 120, 123 (9th Cir. 1977)).

1. It is certainly true that the Elections Clause does not immunize an election law from scrutiny if it threatens core free-speech and equal-protection rights. *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986). And it is true that the Civil War Amendments "operated to alter the pre-existing balance" established in many constitutional provisions, *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 65–66 (1996), including the Elections Clause, thereby empowering judicial involvement unforeseen in 1789. *See Gregory v. Ashcroft*, 501 U.S. 452, 468 (1991). Accordingly, this Court has correctly held that a time, place, or manner rule that violates an *independent* constitutional right is not immune from judicial review simply because it is enacted under the Elections Clause. *Wesberry v. Sanders*, 376 U.S. 1, 6 (1964). Just as Congress's affirmative interstate-commerce, taxing, or spending powers do not immunize ensuing laws from review under constitutional individual-rights guarantees, Elections Clause legislation too must satisfy those guarantees.

But it is equally true that all constitutional provisions must be interpreted together with the Elections Clause as codifying a coherent and unified balance of congressional, legislative, and judicial authority. The Fourteenth Amendment neither abrogated the Elections Clause nor signaled a meaningful departure from its delegation of *legislative* power. For that reason, a proffered interpretation of the Fourteenth Amendment that would disfigure the Election Clause's delegation beyond recognition is untenable. The Civil War Amendments (much less provisions ratified together with the Elections Clause) did not license judicial authorship of state elections codes.

2. This Court's racial-discrimination and one-person, one-vote doctrine leaves state legislative power over congressional elections intact. It targets only discrete abuses and cabins judicial review and remedies to.

The Court's racial precedents address the paradigmatic evils the Civil War Amendments attempted to cure and utilize the same strict scrutiny applied to all racially discriminatory laws. Racial motive and effect are "much more rarely encountered" than *political* motive, *Vieth*, 541 U.S. at 286 (plurality opinion), so review of racial cases does not mark a wholesale transfer of legislative discretion to the judiciary. And, notably, most of the Court's jurisprudence on racial redistricting arises from statute, the Voting Rights Act, not the Constitution.[5]

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[5] Even the Court's racial-gerrymandering precedents, which technically arise under the Equal Protection Clause, virtually

(That a statute is necessary to guarantee racial minorities an equal opportunity "to elect representatives of their choice," 52 U.S.C. § 10301(b), strongly suggests that the Constitution grants no such right to major political parties.)

Similarly, the one-person, one-vote rule—itself controversial when announced—provides a concise and objective framework by which legislatures may redistrict, not a diversion of their power to courts. It provides a "background rule" against which redistricting can occur, *Ala. Legis. Black Caucus v. Alabama*, 135 S. Ct. 1257, 1271 (2015), and otherwise frees legislative political and policy choices from judicial scrutiny.

Equally important, the rule presupposes that individuals receive representation from the representative of their geographic-based districts. *See Evenwel v. Abbott*, 136 S. Ct. 1120, 1127–31 (2016). This traditional view defines an individual by the piece of geography the state designates as the individual's district, the standard unit of representation. *See* 1 Blackstone at 158–59; 178–79. Although perhaps not readily foreseeable in 1789 or 1868, the principle at least follows logically from that traditional notion: a uniform ratio of persons to representatives ensures equality in voting as between persons within that framework. *See Reynolds v. Sims*, 377 U.S. 533, 565–66 (1964); *see also* 1 Blackstone 178–79; *see also id.*, app., note D at 190 ("[N]o just reason therefore can be

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always arise from state legislatures' attempted compliance with the Voting Rights Act. *See, e.g., Miller v. Johnson*, 515 U.S. 900, 916 (1995).

assigned why ten men in one part of the community should have greater weight in its councils, than one hundred in a different place, as is the case in England, where a borough composed of half a dozen freeholders, sends perhaps as many representatives to parliament, as a county which contains as many as thousands."). The rule incorporates a theory of "fair and effective representation for all citizens," *Reynolds*, 377 U.S. at 565–66, grounded in "individual rights," not "generalized partisan preferences," *Gill v. Whitford*, 138 S. Ct. 1916, 1933 (2018).

3. By contrast, the district court's theory assumes a *partisan* framework and ensures an equal right to *success* within that framework. It predicates the right to vote on affiliation with a major political party with millions of members and millions of dollars in funding. It further exposes all legislative decision-making to judicial scrutiny and in no way restricts review to discrete issues distinct from the legislature's core policy judgments. And it proposes a new theory of representation, ignoring that "[a]n individual or a group of individuals who votes for a losing candidate is usually deemed to be adequately represented by the winning candidate and to have as much opportunity to influence that candidate as other voters in the district." *Davis v. Bandemer*, 478 U.S. 109, 132 (1986) (plurality opinion). The district court's theory contains no individual-rights predicate; it instead presupposes a right to a particular partisan composition of the legislature, the assumption being that Democratic Party supporters receive their representation from Democratic Party representatives and vice versa.

The rationale is neither limited nor precise and would work a revolution of the courts' role in legislative matters. It cannot square with the Constitution or traditional American notions of what the right to vote is.

III. Judicial Redistricting Is Political Redistricting

Although partisan-gerrymandering plaintiffs (and the political parties funding the litigation) have long complained of politics in redistricting, two centuries' worth of practical experience demonstrate that districting is "root-and-branch a matter of politics." *Vieth*, 541 U.S. 267, 285 (2004) (plurality opinion). This Court has therefore found it appropriate "to assume that those who redistrict and reapportion work with political and census data" and that, "[w]ithin the limits of the population equality standards of the Equal Protection Clause," they work "to achieve the political or other ends of the State." *Gaffney v. Cummings*, 412 U.S. 735, 754 (1973).

But what happens when judges redistrict? There being no objective legal principles to recommend one district over another, they too engage in political decision-making. And, unsurprisingly, they too "work with political...data" to achieve their own "political" ends in what is "root-and-branch a matter of politics." The trade is one political actor for another, nothing more.

Pennsylvania's experience with state-court partisan-gerrymandering litigation provides a vivid—and entirely repeatable—example of that principle in action. In January 2018, the Pennsylvania

Supreme Court invalidated a legislatively enacted congressional plan and redistricted the state itself, concluding that the legislative plan did not comply with state constitutional requirements for fairness in districting, namely "that all voters have an equal opportunity to translate their votes into representation." *League of Women Voters v. Commonwealth*, 178 A.3d 737, 804 (Pa. 2018). That requirement has no basis in the Pennsylvania Constitution, which provides no congressional redistricting criteria, even while regulating with precision the Commonwealth's *legislative* districts. And the Pennsylvania Supreme Court had no choice but to overrule decades of its own precedents (and the lower court's rejection of the claims) to achieve this result. This included a 2013 decision holding that "nothing in the [Pennsylvania] Constitution" prohibits partisan redistricting. *Holt v. 2011 Legis. Reapportionment Comm'n*, 67 A.3d 1211, 1236 (Pa. 2013); *see also Erfer v. Commonwealth*, 794 A.2d 325, 334 n.4 (Pa. 2002) (holding that "no analogous, direct textual references to...neutral apportionment criteria" govern congressional districts).

The about-face on this supposedly legal question had a political explanation. A Republican-controlled legislature had enacted the challenged congressional districts—with Democratic Party support supplying the votes essential to its passage. Yet judicial elections in 2015 gave control of the Pennsylvania Supreme Court to justices expressly affiliated with the Democratic Party. That development, together with the abrupt change in jurisprudence, would have sufficed to spawn questions about the judiciary's neutrality. But any hope of perceived fairness was shattered when it came to

light that the court's decisions fulfilled campaign promises made by some justices when they ran for election in 2015.

One of the deciding votes (indeed, it was decisive on several key case issues, including at the remedial phase) was cast by Justice David Wecht, who attacked the Commonwealth's congressional plan during his 2015 election campaign. Justice Wecht expressed those views in a forum held by the League of Women Voters—the original lead challenger and named party in the state-court partisan-gerrymandering litigation. At that forum, he stated:

> Everybody in this room should be angry about how gerrymandered we are....Understand, sitting here in the city of Pittsburgh, your vote is diluted. Your power is taken away from you.[6]

On another occasion, he stated:

> There are a million more Democrats in this Commonwealth—I want to let that sink in—a million more Democrats in this Commonwealth, but...*there are only 5 Democrats in the Congress, as opposed to 13 Republicans. Think about it.* Do we need a new Supreme Court? I think you know the answer.[7]

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[6] Eric Holmberg, *Forums Put Spotlight on PA Supreme Court Candidates*, PUBLICSOURCE (Oct. 22, 2015), www.publicsource.org/forums-put-spotlight-on-pa-supreme-court-candidates (emphasis added).

[7] Media Mobilizing Project, *Neighborhood Networks Supreme Court of PA Forum*, YouTube (Apr. 25, 2015), at 18:43, https://www.youtube.com/watch?v=713tnbv55mU&feature= youtu.be (emphasis added).

He also argued:

> ...[I]n 2014, I believe, there were at least more than 200,000 votes for Democratic candidates for U.S. Congress than Republicans *and yet we elected 13 Republicans and 5 Democrats*, and there are more than 1,000,000 more Democrats....I'm not trying to be partisan, but I have to answer your question, frankly–. We have more than a million more Democrats in Pennsylvania, we have a state senate and state house that are overwhelmingly Republican. *You cannot explain this without partisan gerrymandering*.[8]

When these and other statements (including similar statements by other justices during their campaigns)[9] came to light, the legislative parties defending the plan (including the *amicus*) moved for Justice Wecht's recusal. In response, Justice Wecht issued an opinion standing by his prior statements and concluding, *inter alia*, that they were permissible under Pennsylvania

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[8] *Get to Know the Candidates for State Supreme Court*, Lancaster Online (Oct. 31, 2015), http://lancasteronline.com/news/local/get-to-know-the-candidates-for-state-supreme-court/article_65c426d4-6d45-11e5-b74f-6babb36c03bb.html (embedded video for "Judge David Wecht, Democrat from Allegheny County," at 38:23) (emphasis added).

[9] For example, as a candidate, Justice Donahue represented that, if elected, she would ensure that "gerrymandering will come to an end." *Scarnati Issues Statement on PA Supreme Court Justices Wecht & Donohue*, Senator Joe Scarnati Pennsylvania's 25th District (Feb. 2, 2018), https://www.senatorscarnati.com/2018/02/02/scarnati-issues-statement-pa-supreme-court-justices-wecht-donohue/.

law and the First Amendment as judicial campaign speech.

That set the stage for remedial proceedings. The Pennsylvania Supreme Court afforded the Pennsylvania General Assembly only 18 days to enact a new plan, and it withheld its 138-page opinion—which stated such rudimentary points as what provision of the Pennsylvania Constitution the legislative plan violated and the new legal standard the Pennsylvania Supreme Court read into it—until two days prior to that deadline. When the General Assembly could not meet that deadline, the Pennsylvania Supreme Court promptly enacted its own plan which it declared by fiat, with no adversarial proceedings, was compliant with state law and superior to the plans proposed by the legislative leadership (including the *amicus*) and others. In crafting its plan, the court made no effort to implement the legislative policy goals of any legislatively enacted districting plan.

As news accounts have noticed, the court's map was self-evidently drawn to favor the voters of the Democratic Party. The New York Times declared that "Democrats couldn't have asked for much more from the new map. It's arguably even better for them than the maps they proposed themselves."[10] Real Clear Politics observed that the court "repeatedly made choices that increased the Democrats' odds of winning

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[10] Nate Cohn et al., *The New Pennsylvania Congressional Map, District by District*, N.Y. Times: The Upshot (Feb. 19, 2018), https://www.nytimes.com/interactive/2018/02/19/upshot/pennsylvania-new-house-districts-gerrymandering.html.

districts."[11] The judicially drawn map achieves this through remarkable partisan precision, which is essential to counteract Democratic Party constituents' natural geographic concentration in an around Philadelphia and Pittsburgh.

In other words, faced with remedying what it perceived to be a Republican Party-friendly "gerrymander," the Pennsylvania Supreme Court, controlled by a Democratic Party majority, drew a Democratic Party-friendly gerrymander. Indeed, it could do nothing else because, even in the most sanitized of circumstances, a political-gerrymandering cause of action claims the right of a major political party to win elections. Remedying its perceived inability to do so requires judges to use their equitable powers directly, intentionally, and expressly to help the party obtain power. That is what the Pennsylvania Supreme Court did: Democratic Party candidates claimed four new seats that were formerly held by Republican representatives. The district court in this case apparently has similar intentions for North Carolina.

If states are "laboratories for devising solutions to difficult legal problems," *Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2673 (2015) (quotation marks omitted), this Court should heed their Frankenstein and Chernobyl, as much as their Eureka, moments. Redistricting is political because of what it

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[11] Sean Trende, *How Much Will Redrawn Pa. Map Affect the Midterms?*, Real Clear Politics (Feb. 20, 2018), https://www.realclearpolitics.com/articles/2018/02/20/how_much_will_redrawn_pa_map_affect_the_midterms_136319.html.

is, not because of who conducts it. Opening the courts to partisan-gerrymandering litigation holds no promise of non-partisan redistricting and every threat of a politicized judiciary. And, although there is every reason to hope judges can set partisan feelings aside when enforcing *non*-partisan rules (like one person, one vote), that is too much to ask when the rules are themselves partisan in content and the litigants' express demand is for partisan aid in winning elections.

That federal judges are appointed, not elected, in no way mutes these alarms. Federal judges are appointed by the political branches in increasingly contentious and partisan proceedings, and judges are as human as anyone else. Worse, they—unlike the legislators the district court placed in the dock—are not subject to being voted out of office for political decisions. And, if nothing else, judicial redistricting, even by lifetime-appointed federal judges, will raise questions. This case is no exception. *See* Editorial Bd., North Carolina's Gerrymander Coup: Liberal Judges Hijack Redistricting To Abet a Democratic House, Wall Street J., Aug. 30, 2018.[12]

CONCLUSION

The Court should vacate the district court's injunction with instructions to dismiss this case as non-justiciable.

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[12] https://www.wsj.com/articles/north-carolinas-gerrymander-coup-1535670476

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